INDEX

Page

PETITION FOR WRIT OF CERTIORARI 1

JURISDICTION AND OPINIONS BELOW 2

QUESTIONS PRESENTED 2

STATUTORY LAW INVOLVED 5

SUMMARY STATEMENT OF FACTS 7

REASONS FOR ALLOWANCE OF WRIT AND BRIEF IN SUPPORT THEREOF 11

1. Louisiana's Police Power to Regulate the Practice of Law Ousted and Defeated 11
2. Louisiana's Regulation of Contingent Fee Contracts Valid Exercise of Police Power 12
3. Louisiana's Regulation of Contingent Fee Contracts is Not "Repugnant to the Principles Governing Diversity Jurisdiction" 13
4. Federal Court will not Accept Jurisdiction Prior to Exhaustion of Administrative Remedies 16
5. Federal Court Suit Premature 17
6. The Decisions Below Contrary to Louisiana Act 124 of 1906 (La. R.S. 37:218) 17
7. The Decisions Below are Contrary to the Law and Jurisprudence of Louisiana 19
   a. Attorney-client Relationship Creates Only a Revocable "Mandate" in Louisiana 19

Page

b. Revocation of Mandate Preventing Fulfillment of Contingent Fee Contract Does Not Result in Contingency being Considered Fulfilled 21

c. Settlement of the Claim Tacitly Revoked Attorney's Mandate 24

d. Attorney's Remedy for Revocation of Contingent Fee Mandate is Not Breach of Contract for Fee but Suit in *Quantum Meruit* for Reasonable Value of Services Actually Performed 25

e. Appellate Court Found Facts Dehors the Record 27

CONCLUSION 29

CERTIFICATION 31

TABLE OF AUTHORITIES

Page

Barnitz v. Beverly, 163 U.S. 118 17

Bradwell v. Illinois, 16 Wall 130 11

Bryson v. United Gas Public Service, Co., (La. App.) 169 So. 350 19

Buller's Estates, In Re, 192 La. 644, 188 So. 728 19

Burford v. Sun Oil Co., 319 U.S. 315 16

Burr, Ex parte, 9 Wheat 529 12

Calhoun v. Massie, 253 U.S. 170 12

Carbajal, Succession of, 139 La. 481, 71 So. 774, 775 ..... 17, 19, 20

Cole v. Myers, 128 Conn. 223, 21 A.2d 396 28

Emmons v. Smitt, 58 Fed. Supp. 869 ..... 4, 12

Erie Railroad Company v. Tompkins, 304 U.S. 64 ..... 5, 30

Flower v. O'Connor, 7 La. 207 19

Foster, Hall, Barrett & Smith v. Haley, 174 La. 1019, 142 So. 251 ..... 19, 20

Fowler v. Phillips, 159 La. 668, 106 So. 26 19

Gravity Drainage District No. 2 v. Edwards, 207 La. 1, 20 So.2d 405 ..... 19, 26

Haynes v. Fraternal Aid Union, 34 Fed. 2d 305 17

Head v. Providence Insurance Co., 2 Cranch 127 17

Holmes v. Murdock, 125 La. 916, 51 So. 1035 19

TABLE OF AUTHORITIES—(Continued)

Page

Husk v. Blanchard, 155 La. 816, 99 So. 610 ..... 12, 16

Johannot v. Stackpole, 6 Mars. 1827 S. 27.1.169 - D. 25.1.162 26

Kay & Kay v. Alston, 52 So.2d 465 26

LeBlanc, Succession of, 2 La. App. 364 ..... 19, 26

Lockwood, Ex parte, 154 U.S. 116 11

Loque v. DeJan, 129 La. 519, 56 So. 427 19

Marchand v. Gulf Refining Co., 187 La. 1002, 175 So. 649 19

Margolin v. U.S., 269 U.S. 93 12

Martinez v. Vives, 32 La. Ann. 308 19

Massey v. Consumer's Ice Co., 66 So.2d 789 13

McGarry v. Lentz, 13 Fed.2d 51 ..... 4, 14, 16, 17

Mertz's Estates, In Re, 164 Misc. 855, 1 N.Y.S.2d 116 27

Mundy, In Re, 202 La. 41, 11 So.2d 398 12

Newman v. Meyers, 253 U.S. 182 12

Oklahoma, In Re Integration of State Bar of, 185 Okla. 505, 95 P.2d 113 12

Onorata v. Maestri, 173 La. 375, 137 So. 67, p. 69 22

Planters Lumber Co. v. Sugar Cane By-Products Co., 162 La. 123, 110 So. 175 19

Prentis v. Atlantic Coast Lines, 211 U.S. 210-224 ..... 4, 16

Rice, Succession of, 147 La. 834, 86 So. 282 ..... 19, 20

TABLE OF AUTHORITIES—(Continued)

Page

Robinson, Succession of, 188 La. 742, 178 So. 337 19

Schiro v. Macaluso, 13 La. App. 88, 126 So. 244 ..... 19, 20

Smith v. Vicksburg etc., Ry. Co., 112 La. 985, 36 So. 826 28

Southworth v. Rosendahl, 133 Minn. 447, 158 N.W. 717, 3 ALR 468 28

Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368 16

Steckler, Ex parte, 179 La. 410, 154 So. 41 12

Supreme Council of Royal Arcanum v. Green, 237 U.S. 531 17

Tennant v. Russell, 214 La. 1046, 39 So.2d 726 ..... 19, 20

Tennant v. Russell, 210 La. 1092, 29 So.2d 167 ..... 19, 20

Toombs v. Citizens Bank, 281 U.S. 643 15

Trisbie v. U.S., 157 U.S. 165 12

United Gas Public Service Co. v. Christian, 186 La. 689, 173 So. 174 19

U.S. v. Sing Truck, 194 U.S. 161, p. 167 16

West Coast Hotel Co. v. Parrish, 300 U.S. 379 15

Wright v. The Praetorians, 63 F. Supp. 839 17

Louisiana Civil Code

Article 2040 ..... 21, 22, 23, 24

Article 2985 ..... 7, 19

Article 3027 19

TABLE OF AUTHORITIES—(Continued)

Page

Article 3028 ..... 7, 19

Article 3034 19

French Civil Code

Code Napoleon 19, 22

Article 1178 ..... 22, 24

Statutes

Louisiana Statutes Annotated:

Order, Louisiana Supreme Court, March 12, 1941 (West's Louisiana Statutes Annotated, Vol. 21, p. 353 *et seq.*) 2, 3, 4, 5, 6, 11, 12, 14, 15, 29

R.S. 37:211 5

R.S. 37:218 ..... 4, 6, 9, 17, 18, 19

Act 124 of 1906 ..... 17, 18, 19

Act 54 of 1940 5

Texts

Baudry-Lacantinerie et Barde, Obligation t.2, n° 805 22

Berger, Exhaustion of Administrative Remedies, 48 Yale Law Journal 981 16

TABLE OF AUTHORITIES—(Continued)

Page

Castigan, Cases and Other Authorities on the Legal Profession and its Ethics (1933) p. 644 *et seq.* 12

Colin & Capitant, Cours Elementaire de Droit Civil Francais, 10th Ed. Vol. II, p. 874 n° 1369 23

Dalloz, Code Annotes, Article 1178, n° 16 22

Demolombe, t. 25, n° 350 22

Drinker, Legal Ethics (1953) p. 176-177 12

Hicks, Organization & Ethics of the Bench & Bar (1932) p. 305 12

Huc, Commentairie Theorique et Pratique du Code Civil (1899) Vol. XII, p. 148 n° 118; p. 165; 148-155 ..... 23, 25

Jessup, A Study of Legal Ethics (1926) p. 169 12

Larombiere, Theorie & Pratique des Obligations (1857) Vol. II, p. 40 ..... 23, 24

Laurent, Principes de Droit Civil Francais 3rd Ed. (1878) Vol. XVII, t.17, n° 76, p. 90 ..... 22, 23

Moore's Commentary on the U.S. Judicial Code (1949) pp. 400, 402, 409, 414 16

Planiol, Traité Elémentaire de Droit Civil, 3rd Ed. (1905) Vol. II, n° 2257, p. 725; 2258 ..... 22, 25

Pothier on Obligations, No. 212 22

Tausch, Professional & Business Ethics - The Case Against Contingent Fees (1926) pp. 222-226 12

Toullier, t. 6, n° 609 22

TABLE OF AUTHORITIES—(Continued)

Page

Troplong, Droit Civil Explique, Vol. XVI, Du Mandat, p. 652 n° 708, 780; 703 ..... 22, 25

Warvelle, Essays in Legal Ethics (2nd. Ed. 1920) p. 88-91 12

United States Constitution

Amendment 10 ..... 11, 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. . . . . .

UNITED SUPPLY & MANUFACTURING COMPANY OF DELAWARE,

Petitioner-Appellants Below,

versus

TUCKER, BRONSON AND MARTIN,

Respondents-Appellees Below,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF

TO THE HONORABLE THE JUDGES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered February 12, 1954, rehearing denied March 8, 1954, affirming a judg-

ment of the District Court for the Western District of Louisiana in favor of respondent, a firm of Louisiana attorneys, on a contingent fee contract for services rendered exclusively in Louisiana state courts.

JURISDICTION AND OPINIONS BELOW

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

The opinion of the District Court (Tr. pp. 78-81) is as yet unreported.[1] The opinion of the Court of Appeals (Tr. pp. 91-97) filed February 12, 1954, is reported in 210 F.2d 415, motion to reconsider same having been denied March 8, 1954. (Tr. p. 104).

QUESTIONS PRESENTED

The novel and important questions of law presented for determination in these proceedings are:

1. Where the highest court of a state[2] has by formal Order, adopted pursuant to its power to regulate the practice of law, within such state, and the conduct of the members of its Bar as officers of such Court, provided that:

> "A contract for a contingent fee . . . shall always be subject to the supervision of the court as to its reasonableness,"

does a Federal Court have jurisdiction to oust the state court of its supervisory powers over its officers by adjudi-

[1]The District Court's interlocutory opinion denying plaintiff's motion for a summary judgment (Tr. p. 36-41) is reported at 102 F. Supp. 805.

[2]In this instance, the Louisiana Supreme Court.

cating a suit by attorneys on a contingent fee contract for legal services rendered exclusively in the courts of such State prior to a determination of the reasonableness of the contingent fee contract pursuant to the aforesaid Order of Court? — Indeed, is not such a suit in a Federal Court premature until after the State Court has determined the reasonableness of the contingent fee contract pursuant to its Order?

2. Is an Order of the Supreme Court of a State subjecting its attorney's contingent fee contracts "always . . . to the supervision of the court as to its reasonableness" unconstitutional? — And if constitutional, can its force and effect be avoided and evaded, and the client, whose interests are sought to be protected, deprived of such court supervision, by Federal Court intervention and enforcement of a contingent fee contract for services performed in the State courts by an attorney subject to such Supreme Court Order, prior to the exercise of such State Court supervision?

3. Where a State Supreme Court regulation of contingent fee contracts of attorneys as officers of its Courts subjects same

> "always . . . to the supervision of the Court as to its reasonableness,"

does not such regulation become contractually binding upon all of the parties to contingent fee contracts made with an attorney of such state, particularly with respect to litigation conducted exclusively in the State Courts, and a valid exercise of the police power of the State such as that upheld

in *McGarry v. Lentz*[3] and *Emmons v. Smitt*,[4] which must be observed prior to commencement of a suit in a Federal Court?

4. Where the Supreme Court of a State has by Order issued under its police power to regulate the practice of law within such state provided that

> "A contract for a contingent fee . . . shall always be subject to the supervision of the court as to its reasonableness,"

does a complaint in a Federal Court under diversity jurisdiction state a claim for legal services rendered in a State Court under a contingent fee contract without alleging and showing that the State Court has supervised and approved its reasonableness, and that State procedure, supervision, regulation and control has been exhausted, before resorting to the Federal Court, as required by *Prentis v. Atlantic Coast Line*,[5] and other cases?

5. Can a decision of a federal court permitting recovery by an attorney on an informal contingent fee contract be sustained in the face of state statutory regulation of attorneys' contingent fee contracts,[6] requiring that

> "*by written contract signed by the client,* attorneys-at-law may acquire as their fee an interest in the subject matter of the suit, etc. . . ." (Emphasis added)

---

[3]13 Fed. 2d 51.
[4]58 F. Supp. 869.
[5]211 U.S. 210. See also authorities cited *infra* note 22.
[6]La. R.S. 37:218.

6. May a federal court in a diversity of citizenship suit in a civil law state ignore the civil law and the jurisprudence of the courts of that state and decide a case on principles of common law without violating the principals of *Erie Railroad Company v. Tompkins*?[7]

It is respectfully submitted that the above questions raise important issues of the relationship of State and Nation, and of state and federal courts, particularly with respect to the authority of state courts to regulate the practice of law within its borders, and moreover indicate that the Court of Appeals has, in this instance, decided an important question of Louisiana law in a way in conflict with both the civil law traditions of the State of Louisiana and the jurisprudence of the Louisiana Supreme Court, and has ignored the police power of the State of Louisiana and its Supreme Court, in regulating the conduct of attorneys of the practice of law in that state.

STATUTORY LAW INVOLVED

> LA. R.S. 37:211: "The Louisiana State Bar Association is created and regulated under the rule-making power of the Supreme Court of Louisiana, pursuant to a memorial addressed to the court by the legislature in Act 54 of 1940."

ORDER OF THE SUPREME COURT OF LOUISIANA, *In the matter of the Creation of the Louisiana State Bar Association*, March 12, 1941 (Reprinted West's Louisiana Statutes Annotated, Volume 21, page 353 *et seq.*):

"... The Louisiana State Bar Association is here-

[7] 304 U.S. 64.

by organized under the rule-making power of the Court. The rules and regulations which shall govern it as an agency of the Court are the articles set forth in Exhibit A . . . a copy of which is annexed to this order and made part hereof as fully as though copied in extenso herein. The Court hereby adopts and promulgates the articles of said proposed form as rules of this Court . . ."

Article XIV. Professional Ethics

"The following cannons of ethics shall govern the professional conduct of the members of this Association:

"13. *Contingent fees*

A contract for a contingent fee shall be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but shall always be subject to the supervision of the court, as to its reasonableness."

LA. R.S. 37:218. *Contracts for fees based on proportion of Subject Matter; Stipulations concerning Compromise*

"By written contract signed by the client, attorneys at law may acquire as their fee an interest in the subject matter of the suit, proposed suit, or claim, in the prosecution or defense of which they are employed, whether the suit or claim be for money or for property. In such a contract of employment, it may be stipulated that neither the attorney nor the client may, without the written consent of the other, settle, compromise, release, discontinue, or otherwise dispose of the suit or claim. Either party to the contract may, at any

time, file it with the clerk of the district court in which the suit is pending or is to be brought and have a copy made and served on the opposing party and due return made as in case of petitions in ordinary suits. After such service, any settlement, compromise, discontinuance, or other disposition made of the suit or claim by either the attorney or the client without the written consent of the other is null and void and the suit or claim shall be proceeded with as if no such settlement or discontinuance had been made."

Louisiana Civil Code: Mandate:

"Article 2985 . . . *Definition:* - A mandate, procuration or letter of attorney is an act by which one person gives power to another to transact for him and in his name, one or several affairs."

"Article 3028-*Principal's right to revoke Power:* - Except in the case of irrevocable powers of attorney, as described in the preceding article, the principal may revoke his power of attorney, whenever he thinks proper, and, if necessary, compel the agent to deliver up the written instrument containing it, if it be an act under private signature."

SUMMARY STATEMENT OF FACTS[8]

Petitioner had a delinquent claim on open account for oil well supplies totaling $27,437.02 against one R. P. Phillips d/b/a R. P. Phillips Oil Well Supply Company, about which it consulted respondents, a firm of Louisiana attor-

[8]The facts are nowhere in dispute. Most of them are alleged in the petition (T. p. 5-8) and admitted in the answer (T. p. 23-24).

neys-at-law. After some preliminary advice and suggestions with respect to the claim, and after learning that all of the debtor's assets were mortgaged and the general creditors including petitioner had no unencumbered assets to look to for recovery, respondents recommended a suit in the State Courts of Louisiana on the promissory notes which had been given for the claim, a reduction thereof to judgment, and thereafter executing on the judgment and attacking the various mortgages in order to enforce collection.[9] At all times, respondents were fully aware that independent negotiations were being conducted between petitioner and the debtor, Phillips, looking toward a payment of the claim without suit by virtue of refinancing imminently anticipated by the debtor.

As respondents' recommendations obviously contemplated very substantial and protracted legal services, petitioner first inquired of respondents as to its obligations for legal fees. Respondents outlined the following fee basis in a letter dated May 24, 1951.[10]

> "Re: United Supply and Manufacturing Co. v. R. P. Phillips Well Service, Lafayette, Louisiana
>
> Concerning the above matter and particularly with reference to the fee arrangement, we wish to advise that as we understood it, your company would pay all costs incurred. We would receive a nominal fee in the event the proposed action was unsuccessful. By nominal, we mean $100.00 to $200.00 to be determined by the amount of time spent.

---

[9]T. p. 61.
[10]Exhibit P. 2 and P. 11.

In the event the proposed action was successful in whole or in part, we are to receive a contingent fee of 15% of the net amount realized. In this connection, we assume that the note has a provision for attorney's fee, which would be included in the 15% contingent fee.

We trust the foregoing is satisfactory to you.

Very truly yours,

S/ H. M. Holder
Tucker, Bronson & Martin"

With such understanding of the fee to be charged for their contemplated services, as specifically alleged by respondents[11] "defendant retained petitioners to represent it in filing suit against R. P. Phillips." Petitioner did not retain respondents to represent it in any other capacity, nor to negotiate for an amicable settlement of this claim, which negotiations petitioner continued to carry on itself; nor did the parties enter into the formal contract required by La. R.S. 37:218 "for fees based on a proportion of the subject matter," nor "stipulate concerning compromise."

The only services performed by respondents subsequent to the letter under the above retainer were the following:

1. Respondents drafted a petition on the notes against the debtor for filing in the state court in Lafayette, Louisiana, which petition was never filed because petitioner's independent negotiations with the debtor indicated that to file it at that time may interfere with the debtor's refinancing.

[11]See Respondent's petition T. p. 7.

2. Respondents traveled from Shreveport, Louisiana, to Lafayette, Louisiana and return (a distance of about 440 miles) in connection with this proposed suit.

3. On returning to Shreveport, respondents redrafted the petition for filing in the state court in Shreveport, (Caddo Parish), Louisiana, and filed same two days later on June 9, 1951.

4. Eleven days later, on June 20, 1951, without an answer having been filed, respondents voluntarily dismissed the suit on instructions of petitioners, pursuant to successful settlement negotiations conducted exclusively by petitioner.

The debtor specifically testified that the filing of the suit in no way affected or contributed to the settlement, which was accomplished as a result of refinancing, but indeed to the contrary, the filing of the suit was detrimental thereto.[12] The settlement called for petitioner accepting a series of notes totaling $28,570.43, given by the debtor's re-organized company—a partnership including third persons—and plaintiffs then brought this suit in the Federal District Court on diversity jurisdiction claiming 15% of the proceeds of these notes pursuant to the aforesaid letter.

Petitioner, while conceding that respondents are entitled to be paid a reasonable fee for the services actually rendered on a *quantum meruit* basis, defended this suit on the alleged contingent fee contract, asserting the following defenses:[13]

---

[12]Testimony Phillips, T. p. 72, 73, 76.
[13]See Answer, T. p. 22.

1. That the complaint failed to state a claim.

2. That plaintiff was only entitled to have its fee fixed by a proper court.

3. That its fee should be fixed on a *quantum meruit* basis by such "proper Court."

4. That on *quantum meruit*, the jurisdictional amount of $3,000.00 was not present.

The District Court overruled all such defenses and the Court of Appeals affirmed.

REASONS FOR ALLOWANCE OF WRIT AND BRIEF IN SUPPORT THEREOF

1. Louisiana's Police Power to Regulate the Practice of Law Ousted and Defeated

The federal court has by accepting jurisdiction of and adjudicating this case prior to the Louisiana Courts' having an opportunity to supervise this contingent fee contract, as required by the Order of the Louisiana Supreme Court, deprived the State of Louisiana, through its Courts, of the exercise of its police powers reserved to Louisiana under Amendment 10 to the United States Constitution. As said by this Court:

> ". . . the right to control and regulate the granting of license to practice law in the courts of a state is one of those powers which are not transferred for its protection to the Federal government . . ."[14]

[14] *Bradwell v. Illinois*, 16 Wall. 130. See also *Ex parte Lockwood*, 154 U.S. 116.

As such power is inherent in the State Court,[15] and because respondents are Louisiana attorneys, the Louisiana Supreme Court has the inherent right to exercise supervision over the reasonableness of contingent fees charged by its officers, and the members of its bar, in cases brought before its courts.[16] The lower courts here completely ignored the authority of Louisiana's courts to regulate the practice of law and the professional conduct of its attorneys, and in so doing invaded the powers reserved to the States under Amendment 10 to the United States Constitution.

2. Louisiana's Regulation of Contingent-fee Contracts Constitutional as a Valid Exercise of Police Power

The regulation of attorney's contingent fee contracts is a valid exercise of the police power of the States, and particularly of the Courts of the States.[17] Contingent fee contracts by attorneys have long been a subject of criticism — indeed, were once considered not only unethical, but illegal — and the necessity for their regulation and supervision is everywhere recognized.[18] The Order of the Su-

---

[15]See *Ex parte Burr*, 9 Wheat. 529; *In Re Mundy*, 202 La. 41, 11 So.2d 398; *Ex parte Steckler*, 179 La. 410, 154 So. 41; *In Re Integration of State Bar of Oklahoma*, 185 Okl. 505, 95 P.2d 113.

[16]See *Emmons v. Smitt*, 58 F. Supp. 869.

[17]C.f. *Margolin v. U.S.*, 269 U.S. 93; *Calhoun v. Massie*, 253 U.S. 170; *Newman v. Meyers*, 253 U.S. 182; *Trisbie v. U.S.*, 157 U.S. 165, wherein regulation of attorney's contingent fee contracts on federal claims by Congress were upheld, with cases cited *Supra* Notes 14, 15 and 16 upholding the police power of the states generally to regulate the conduct of attorneys. See also *Husk v. Blanchard*, 155 La. 816, 99 So. 610.

[18]See Warvelle, ESSAYS IN LEGAL ETHICS (2d Ed., 1920), 88-91; Drinker, LEGAL ETHICS (1953) p. 176-177; Hicks, ORGANIZATION AND ETHICS OF THE BENCH AND BAR (1932); p. 305; Castigan, CASES AND OTHER AUTHORITIES ON THE LEGAL PROFESSION AND ITS ETHICS (1933) p. 644 *seq.*; Jessup, A STUDY OF LEGAL ETHICS (1926) p. 169; Tausch, PROFESSIONAL AND BUSINESS ETHICS — *The Case Against Contingent Fees* — (1926) pp. 222-226.

preme Court of Louisiana is certainly reasonable — it is practically verbatim Cannon 13 of the *Cannons of Ethics* of the American Bar Association!

The lower Federal Courts in this case have deprived petitioner of his right under the police regulation of the Louisiana Supreme Court to supervision of the reasonableness of the contingent fee contract in this case, and have deprived the Louisiana courts of their supervisory powers over their own officers. The Louisiana Supreme Court has recently held in *Massey v. Consumers Ice Co.*[18a] that in Louisiana:

> "It is well settled that the question of the value of services rendered by an attorney-at-law is one that comes peculiarly within the province of the judge before whom the services were performed."

The decisions of the lower Federal Courts in this case completely abolishes this rule, takes supervision of the reasonableness of the value of the attorney's services under a contingent fee contract completely away from the State Court judge before whom the services were performed, and blindly enforces a contingent fee contract regardless of its reasonableness in violation of state law by federal judges knowing nothing of the value of the services rendered in the State Court.

3. Louisiana's Regulation of Contingent Fee Contracts is not "Repugnant to the Principles Governing Diversity Jurisdiction"

[18a]66 So.2d 789.

The Court of Appeals in this case has in effect held that the Order of the Louisiana Supreme Court subjecting attorneys' contingent fee contracts "always . . . to the supervision of the court" is unconstitutional as "repugnant to the principles governing diversity jurisdiction."[19] But this completely misses the point. As pointed out in *McGarry v. Lentz*[20] where a similar objection was made to a state police regulation affecting recourse to the courts, this confuses the question of jurisdiction with the contract rights of the parties. In the *Lentz* case, the United States Court of Appeals for the Sixth Circuit said:

> "Appellants in the present case, however, insist that the effect of giving this construction to section 9487 of the General Code of Ohio is the equivalent of conceding that the state Legislature may by statute curtail the jurisdiction of the federal courts of equity. This confuses the question of jurisdiction with that of the contract rights of the complainant. While the question is sometimes loosely referred to as one involving the jurisdiction of the court over the subject-matter of the litigation, the purpose, scope, and effect of section 9487 of the General Code of Ohio, and similar provisions, in other states, are those of the limitation of the rights of members and policy holders, rather than a restriction upon the jurisdiction of courts of equity.
>
> In the present case the very contract, which created whatever rights the complainants may have, limited and defined those rights, so as to exclude the remedy now asserted. The question, therefore, is not whether the complainants are by statute

[19]See Opinion, Court of Appeals, T. p. 95.
[20]13 Fed. 2d 51.

> precluded from asserting in this court a right given them by law, but rather whether the right was ever existent. The complainants have no rights here which do not originate under and are not founded upon their contracts of membership and policies of insurance in the American Insurance Union. The statutes of Ohio which were in force at the time such policies were issued are to be read into and considered as forming an integral part of such contracts."

Moreover, after the supervision of this contingent fee contract as to its "reasonableness" by the Louisiana courts pursuant to the Order of the Supreme Court, respondents can then seek enforcement of the contingent fee contract bearing the stamp of approval of the State Courts as to its "reasonableness" in a Federal Court under diversity jurisdiction if respondents so desire. The enforcement of it prior to such supervision, however, completely ousts the State Court of jurisdiction, deprives the client of the supervision guaranteed him by the police regulations of the State, deprives the Louisiana Supreme Court of the right and opportunity to supervise the attorneys of its own bar and the officers of its own courts, and results in a declaration of unconstitutionality of a state policy under circumstances in no sense necessary for the preservation of the diversity jurisdiction of federal courts.

It is a well established principle of constitutional law that a state statute or a state act will never be declared unconstitutional unless clearly in conflict with the federal constitution, and every presumption will be indulged in favor of constitutionality.[21]

[21] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379; *Toombs v. Citizens Bank*, 281 U.S. 643.

Thus, the police regulation of Louisiana here in question not only is per se valid and reasonable, but moreover is not in conflict in any way with the federal constitution or "repugnant to the principles governing diversity jurisdiction," both on the grounds set forth in the *Lentz* case, and because diversity jurisdiction exists after (but not before) a determination of reasonableness by the State Court under the Order.

4. Federal Court will not Accept Jurisdiction Prior to Exhaustion of Administrative Remedies

The Louisiana Supreme Court in supervising the "reasonableness" of its official's contingent fee contracts with clients, is performing an administrative rather than a judicial function.[21a] In accepting jurisdiction of, and deciding this case prior to and without a State Court determination of the "reasonableness" of the rate charged in this instance, the lower courts have not only violated and ignored the police power of Louisiana, but have ignored the principle that:

> "Administrative remedies must be exhausted before resort is had to the Federal Courts. The doctrine is as old as federal administrative law, and in the fifty years that have elapsed since the early decisions, it has been expounded in a formidable mass of case law . . ."[22]

[21a] See *Husk v. Blanchard*, 155 La. 816, 99 So. 610.

[22] Berger, *Exhaustion of Administrative Remedies*, 48 YALE LAW JOURNAL, at p. 981. See *U.S. v. Sing Truck*, 194 U.S. 161 at p. 167; *Prentis v. Atlantic Coast Line*, 211 U.S. 210, 224. See also Moore's COMMENTARY ON THE U.S. JUDICIAL CODE (1949) pp. 400-402, 409-414; *Burford v. Sun Oil Co.*, 319 U.S. 315; *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368.

5. Federal Court Suit Premature

As the Louisiana Bar is an integrated quasi-public Association, Louisiana, through its Supreme Court, has the power to regulate, prescribe, limit and supervise the rights of its members, and its police regulations, including requirements that the reasonableness of its members contracts with the public be subject to the supervision of State Courts, are valid and enforcible exercises of state police power, in the face of which Federal Courts will not act, at least until state supervision has been exhausted.[23]

6. The Decisions Below Contrary to La. Act 124 of 1906 (La. R.S. 37:218)

The decisions below completely ignored an express statutory regulation of contingent fee contracts in Louisiana and awarded judgment in flat contradiction of the express language, intent and purpose thereof.

The history of contingent fee contracts, and the public policy of the State of Louisiana with respect thereto, is succinctly set forth in the opinion of the Louisiana Supreme Court in *Succession of Carbajal*[24] as follows:

> "We may start with the proposition that, prior to the passage of Act No. 124 of 1906, a contract for a contingent fee gave an attorney no interest in the subject-matter of the litigation to which the contract might relate, but entitled him only to a

[23] *Supreme Council of Royal Arcanum v. Green*, 237 U.S. 531; *Head v. Providence Ins. Co.*, 2 Cranch 127; *Barnitz v. Beverly*, 163 U.S. 118; *Wright v. The Praetorians*, 63 F. Supp. 839; *McGarry v. Lentz*, 13 F.2d 51; *Haynes v. Fraternal Aid Union*, 34 F.2d 305. See also authorities *supra* note 22.

[24] 139 La. 481, 71 So. 774.

> privilege upon the judgment, if and when obtained, and that, notwithstanding such contract, it was within the power of the client to discontinue the suit at will, leaving to the attorney his right of action on *quantum meruit* for services rendered. . . . In fact, until this act was passed, a contract between an attorney and client, whereby the former was to receive as compensation for his services "any portion of the land or any other property . . . in dispute or sued for" was "null and void to all intents and purposes," according to the express language of the act of 1808 . . ."

Act 124 of 1906 (now R. S. 37:218) is set out above in full. Its pertinent parts provide that:

> "by written contract signed by the client, attorneys-at-law may acquire as their fee an interest in the subject matter of the suit . . . or claim."

Petitioners entered into no such contract with respondents, and hence it seems irrefutable that not having the advantage of the statutory contract, the law applicable to the relationship must be the law prior to the passage thereof, which the Supreme Court specifically describes as

> ". . . that, notwithstanding such (contingent fee) contract, it was within the power of the client to discontinue the suit at will, leaving to the attorney his right of action on *quantum meruit* for services rendered . . ."

Neither court below ever adverted to, or took this statute into account—yet it, and its history and purposes as explained by the Louisiana Supreme Court, require a reversal of the judgment in favor of respondent.

7. The Decision Below is Contrary to the Law and Jurisprudence of Louisiana

a). Attorney-client relationship creates only a revocable "mandate" in Louisiana.

Louisiana is a Civil Law state whose Civil Code and local law is based directly on the Code Napoleon. The law applicable to the attorney-client relation is the law of "Mandate," as set forth in Articles 2985-3034 of the Louisiana Civil Code. Pursuant to Article 3028 of the Code, "except in the case of irrevocable powers of attorney . . . a principal may revoke a power of attorney whenever he thinks proper."[25]

It is fully settled in Louisiana that a contract for the legal services of an attorney is a mandate revocable at the client's will except where an irrevocable power of attorney is stipulated by a written contract in the form required by Act 124 of 1906, R.S. 37:218,[26] which form was not employed in the instant case.

In *Loque v. DeJan*,[27] the Louisiana Supreme Court said:

---

[25]See also Civil Code Art. 3027.

[26]*Succession of Robinson*, 188 La. 742, 178 So. 337; *Foster, Hall, Barrett & Smith v. Haley*, 174 La. 1019, 142 So. 251; *Bryson v. United Gas Public Service Co.* (La. App.) 169 So. 350; *In re Buller's Estates*, 192 La. 644, 188 So. 728; *Loque v. Dejan*, 129 La. 519, 56 So. 427; *Planters Lumber Co. v. Sugar Cane By-Products Co.*, 162 La. 123, 110 So. 175; *Schiro v. Macaluso*, 13 La. App. 88, 126 So. 244; *Fowler v. Phillips*, 159 La. 668, 106 So. 26; *Holmes v. Murdock*, 125 La. 916, 51 So. 1035; *United Gas Public Service Co. v. Christian*, 186 La. 689, 173 So. 174; *Marchand v. Gulf Refining Co.*, 187 La. 1002, 175 So. 649; *Succession of LeBlanc*, 2 La. App. 364; *Succession of Carbajal*, 139 La. 481, 71 So. 774; *Flower v. O'Connor*, 7 La. 207; *Martinez v. Vives*, 32 La. Ann. 308; *Tennant v. Russell*, 210 La. 1092, 29 So.2d 167; *Tennant v. Russell*, 214 La. 1046, 39 So.2d 726; *Gravity Drainage District No. 2 v. Edwards*, 207 La. 1, 20 So.2d 405; *Succession of Rice*, 147 La. 834, 86 So. 282.

[27]129 La. 519, 56 So. 427.

"Plaintiff's contention was that his contract could not be prejudicially revoked, as he had acquired the right, within a reasonable time, to prosecute the action. That the time within which the services were to be rendered was understood, and the amount of the fees fixed.

"Defendant's contention, in support of the exception of no cause of action, is that the employment was for an indefinite period and for a contingent fee, and that, on that account, it was revocable whenever she chose to exercise that right. That, after the contract had been recalled and rescinded, plaintiff had no cause of action for damages."

"From the foregoing, we deduce that the test is where there is a mandate with an interest; the agent or attorney acquires a vested right of which he cannot be diverted by his discharge.

"Of course, if plaintiff had acquired an interest, he is entitled to the amount claimed. But, if he was not vested with an interest, it was a mandate which could be terminated, as was done in this instance.

Subsequently, in *Tennant v. Russell*,[28] the Court said: The *Succession of Carbajal*, 139 La. 481, 71 So. 774, 775 should be of great weight in determining the issue herein for there the Court said . . . a contract for a contingent fee gave an attorney no interest in the subject matter of the litigation to which the contract might relate, but entitled him only to a privilege upon the judgment, if, and when obtained, and that, notwithstanding such

[28]214 La. 1046, 39 So.2d 726, See also same case, 210 La. 1092, 29 So.2d 167; See also *Schiro v. Macaluso*, 126 So. 244; *Foster, Hall, Barnett & Smith v. Haley*, 174 La. 1019, 142 So. 251. *Succession of Rice*, 147 La. 834, 86 So. 282.

> contract, it was within the power of the client to discontinue the suit at will, leaving to the attorney his right of action on *quantum meruit* for services rendered."

From the above, it is apparent that the Court of Appeals below completely misunderstood the Civil Law theory of Mandate in holding that the attorney-client relationship is not a revocable mandate in Louisiana.[29]

b). Revocation of Mandate Preventing Fulfillment of Contingent Fee Contract does not Result in Contingency being Considered Fulfilled.

The Court of Appeals erroneously assumed that Article 2040 of the Louisiana Civil Code providing that

> "The condition is considered as fulfilled when the fulfillment of it has been prevented by the party bound to perform it"

was applicable to the contract of mandate, and required a holding that the contingent fee contract must be considered as fulfilled because the client, by revoking the mandate and settling the case, made its performance by the attorney impossible.[30]

The Louisiana Supreme Court has expressly held that Art. 2040 of the Code has no applicability to a resolutory

---

[29]Opinion, T. Page 95.

[30]See Opinion, T. pp. 95, 96.

condition in the case of *Onorato v. Maestri*[31] where the Court said:

> "Article 2040 of the Civil Code admits of an exception, which arises whenever, in doing an act which results in preventing the accomplishment of the condition, the debtor, by thus acting, has exercised only a legal right. Such is the view of Pothier, expressed in commenting on a similar principle, and such is the view of the commentators on the Code Napoleon, expressed in commenting on Article 1178 of that Code. Pothier on Obligations, No. 212; Toullier, t. 6, No. 609; Laurent, t. 17, No. 76; Dalloz, Code annotes, Article 1178, No. 16; Baudry-Lacantinerie et Barde, Obligations, t. 2, No. 805; Demolombe, t. 25, No. 350."

This is completely in accord with the results reached by the French authorities under the comparable articles of the Code Napoleon and the French Civil Code. Thus Troplong, *Droit Civil Explique*[32] comments:[33]

> "Indeed, it must be remembered that when the mandate is contracted, the only person who is immediately bound is the mandatary. The principal only becomes obligated *ex post facto* and when the mandatary has performed some acts of execution for which the princpial owes him a ratification or an indemnity."

According to Planiol:[34]

---

[31]173 La. 375, 137 So. 67, p. 69.

[32]Vol. XVI, DU MANDAT, p. 652 nº 708.

[33]This, and subsequent translations from the French Commentators are free translations.

[34]Planiol, TRAÍTÉ ELEMENTAIRE DE DROIT CIVIL, 3rd Ed. (1905) Vol. II, nº 2257, p. 725

> "Revocation by the principal is always possible even when the mandatary is at the same time employed as a paid agent; but if he is dismissed as an employee at the same time that the power of attorney is revoked, the mandatary may have a right upon this score to an indemnity."[35]

All of the commentators agree that where one of the parties to a contract makes its performance impossible merely by exercising a legal right, such party is not liable for damages under the French counterpart of the Louisiana Civil Code Article 2040. Thus Larombiere[36] observes:

> "It is not absolutely true, however, that the condition is always deemed fulfilled when the debtor bound thereunder has prevented its performance. A principal exception naturally exists when the one who is bound under a condition has only to exercise his will in order to prevent its performance. For example, I will sell you my house if I marry a certain person. Free to marry or not to marry the person indicated, I am the absolute master of the execution of the condition. It is of little consequence, therefore, by what means I make it impossible for the potestative condition on my part to be fulfilled . . . and the condition far from being considered as having been fulfilled, will be deemed to have failed."

According to Laurent:[37]

> "He who does what he has a right to do is not

[35]See also Huc, COMMENTAIRE THEORIQUE ET PRATIQUE DU CODE CIVIL (1899) Vol. XII. p. 148, nº 118; Colin and Capitant, COURS ELÉMENTAIRE DE DROIT CIVIL FRANCAIS, 10th Ed. Vol. II, p. 874 nº 1369.

[36]THEORIE & PRATIQUE DES OBLIGATIONS (1857) Vol. II, p. 140.

[37]PRINCIPES DE DROIT CIVIL FRANCAIS, 3rd Ed. (1878) Vol. 17, nº 76, p. 90.

> bound to repair the damage that he causes; and as the provision of Article 1178 (the French counterpart of Article 2040) is fundamentally the reparation of a wrong, there is no reason to apply it when the act of the debtor which prevented the fulfillment of the condition is the exercise of a right."

As the principal, under the Civil Law system, always has a right to revoke the mandate and thus prevent the performance of the condition, clearly the exercise by a client of his legal right to discharge his attorney under a contingent fee contract, cannot, under the Civil Law, make the client liable on his contract prior to the performance of the services contemplated and the happening of the contingency. The client has merely exercised his legal right to revoke the mandate and thus make the happening of the contingency impossible. Under those circumstances as pointed out by Larombiere, *supra*, "the condition far from being considered as having been fulfilled, will be deemed to have failed." Thus the attorney's remedy is not damages for breach of contract, but compensation for the reasonable value of the services already performed on a *quantum meruit* basis.

c). Settlement of the Claim Tacitly Revoked Attorney's Mandate.

Finally, the Court of Appeals greviously erred in holding that the client here did not revoke the agent's mandate by ordering the dismissal of the suit.[38] The civilians all

---

[38]Opinion, T. pp. 95, 96, 97.

agree that a mandate may be revoked either expressly or tacitly:

> "Tacit revocation results from any fact implying a change of will on the part of the principal"[39]

Thus Troplong[40] gives as an example of a tacit revocation practically the very situation involved in this case. In his *Droit Civil Explique - Du Mandat*, Troplong states[41]

> "Suppose, for example, that, in a transaction which is handled by the mandatary, the principal himself intervenes and places himself in direct contact with the third parties, assuming authority, resolving the difficulties, making the decisions, etc., etc. It is evident that this appearance of the principal will wipe out the mandatary's powers."[42]

d). Attorneys' Remedy for Revocation of Contingent Fee Mandate is Not Breach of Contract for Fee but Suit in Quantum Meruit for Reasonable Value of Services Actually Performed.

From the above, it is clear that the attorneys' only remedy upon revocation of his mandate prior to the attorneys' performance of all of his services and collection of the debt is to sue a client for the reasonable value of the services actually performed by him in *quantum meruit*. At Civil

---

[39]Planiol, TRAITE ELÉMENTAIRE DE DROIT CIVIL 3rd Ed. (1905) Vol. II, p. 725, nº 2258.
[40]*Supra* p. 22.
[41]Volume XVI, p. 703, nº 780.
[42]See also *Loc. Cit. Supra*, p. 658-659, nº 712-13, Huc. Vol. XII, p. 148, 155; Planiol Vol. II, p. 725.

Law, he has no right to sue for breach of contract for the contingent fee because, as pointed out above, a client in revoking his mandate has breached no contract but simply exercised a right he was entitled to exercise. Thus in *Gravity Drainage District No. 2 v. Edwards*,[43] the Supreme Court of Louisiana stated the rule as follows:

> "It is universally recognized that a client may revoke the employment of his attorney at will, and this is true even though the attorney is serving for a contingent fee.
> Of course, the recovery of any amount is precluded in this case by the dismissal of this appeal. Under the circumstances, Mr. Inman's right, if any, to a fee must be evaluated on a *quantum meruit* basis."[44]

The Supreme Court of Cassation of France in the early case of *Johannot c. Stackpole*,[45] denied a mandatary recovery on contingent fee contract in a case essentially similar to the one here. There the principal promised to pay the agent 250,000 *fr.* contingent upon recovery by the agent at his own expense and within a year, of a debt owed the principal by a third person. Nevertheless, the principal tacitly revoked the agency within the year by appointing another agent to collect the debt. The first agent instituted suit against the principal claiming 250,000 *fr.* on the ground of breach of the contract of employment. The Court of Cassation denied the claim holding that the contract was one of mandate, essentially revocable, and had been tacitly revoked by the principal as he was entitled to do, and therefore the

---

[43]207 La. 1, 20 So.2d 405.
[44]See also cases cited at *Supra* Note 26. See also *Succession of LeBlanc*, 2 La. App. 364; *Kay & Kay v. Alston*, 52 So.2d 465.
[45]6 Mars. 1827 S. 27.1.169 - D. 25.1.162.

mandatary could not recover the consideration expressed in the contract, but was entitled only to an indemnity of 25,000 *fr.* on *quantum meruit.*

e). Appellate Court Found Facts Dehors the Record.

The opinion of the Circuit Court seems to imply that petitioners

> "have schemed and planned to deprive plaintiff of its agreed fee."[46]

There is absolutely nothing in the record or in the findings of the District Court to support any such conclusion of fact, and indeed, the Court of Appeals even states that:

> "the record neither supports nor tends to support this view."[47]

To the contrary, throughout, petitioner has conceded at all times that respondents were entitled to the fair value of their legal services actually rendered. As pointed out by the court in the case of *In Re Mertz's Estate,*[48] the allowance of a recovery on *quantum meruit* to an attorney whose suit is settled by the client under a contingent fee contract obviates any suggestion of a "scheme and plan to deprive plaintiff of its agreed fee." There the Court said:

> "The client has the right to end the employment at any time before complete performance . . . the

[46]Opinion T. p. 97.
[47]Ibid.
[48]164 Misc. 855, 1 N.Y.S. 2d 116.

> client's right to control her retainer does not permit her to cheat her attorney . . . if the attorney shall be paid the reasonable value of his services, no cheating will occur."

Indeed, if there is any cheating in question (which we hasten to say we do not believe is involved on either side in this case), it is quite the other way about, because the attorney under such circumstances seeks full payment for services never rendered. As pointed out in *Cole v. Myers*:[49]

> "An attorney at law is an officer of the court; a minister of justice. He is entitled to fair compensation for his services, but since, because of the highly confidential relationship, the client may discharge him even without just cause, he should receive reasonable compensation for the work he has done up to that point, and not the agreed fee he probably would have earned had he been allowed to continue in his employment. This rule is not unfair to the attorney. He will receive fair compensation for what he has done; his position as an officer of the court does not entitle him to receive payment for services he has not rendered."

As pointed out in *Southworth v. Rosendahl*:[50]

> "The law favors the compromise of disputes without litigation, and it is difficult to conceive of any stipulation more against public policy than one which prohibits the party from settling his own dispute or at least prevents it, except for his subjecting himself to the payment of an arbitrary penalty for doing so; and this is the stipulation

---

[49]128 Conn. 223, 21 A.2d 396.

[50]133 Minn. 447, 158 N.W. 717, 3 ALR 468; see *Smith v. Vicksburg etc. Ry. Co.*, 112 La. 985, 36 So. 826.

which plaintiff is seeking to enforce in this action. We think it is void as against public policy."

Hence, it is respectfully submitted that questions of cheating on either side are inappropriate to the consideration of this case, and that the Louisiana rule granting attorneys' recovery on a *quantum meruit* basis under such circumstances is essentially fair, honorable, and just, both to the attorney and to the client.

CONCLUSION

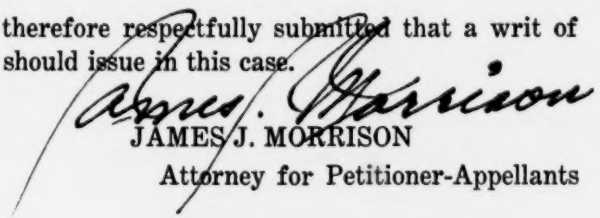
Petitioner respectfully shows that there are special and compelling reasons for the issuance of a writ of certiorari in this matter. The Fifth Circuit Court of Appeals, by ignoring and according no vitality to the Order of the Louisiana Supreme Court subjecting attorneys' contingent fee contracts "always . . . to the supervision of the court" on the ground that to recognize its vitality and applicability would be "repugnant to the principles governing diversity jurisdiction," has in effect held the Order of the Louisiana Supreme Court unconstitutional, and has vitiated a police regulation based on an important public policy of the State of Louisiana.

Moreover, it has brought into violent and unnecessary conflict the State and Federal judicial systems in a most sensitive area — the authority and efficacy of State Court supervision of the ethics and public relations of its own officers and attorneys with respect to the reasonableness of contingent fee contracts for services rendered in state court suits. The incongruous result of this case is to deprive the State Court of an opportunity to supervise the reason-

ableness of the charges of one of its own attorneys and officers for services rendered in its own court, despite its public guarantee by formal Order that contingent fee contracts "shall always be subject to the supervision of the court."

Finally, the decision below has ignored the Civil Law traditions and principles of Louisiana on an important question of local law, and has decided said question, not in conformity with the Civil Law of Louisiana, but in conflict with its applicable decisions, statutes and legal theories. The decision below thus clearly violates the principles of this court announced in *Erie Railroad Company v. Tompkins.*

It is therefore respectfully submitted that a writ of certiorari should issue in this case.



JAMES J. MORRISON
Attorney for Petitioner-Appellants

RUDOLPH R. SCHOEMANN
On the Brief

OF COUNSEL:

W. C. PERRAULT, ESQ.

THOMAS A. LANDRITH, JR.

CERTIFICATION

I certify that copies hereof have been served on counsel for Respondent-Appellees.

